

PHONE (808) 594-1888



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FAX (808) 594-1865

STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
711 KAPI'OLANI BOULEVARD, SUITE 500
HONOLULU, HAWAII 96813

HRD09/4353

May 26, 2009

Honorable Laura H. Thielen, Chairperson
Ken C. Kawahara, Deputy Director
Commission on Water Resource Management
P.O. Box 621
Honolulu, HI 96809

**RE: Request for comments on Avery & Mary Chumbley and Makani Olu Partners
LLC's Surface Water Use Permit Application – Existing Uses, Nā Wai `Ehā Surface
Water Management Areas, Maui.**

Aloha e Laura H. Thielen and Ken C. Kawahara,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated April 29, 2009 and appreciates the opportunity to comment on Avery and Mary Chumbley and Makani Olu Partners LLC's (collective, the Chumbley) Surface Water Use Permit Application (SWUPA) for an existing use in the Nā Wai `Ehā Surface Water Management Area.

As an initial matter, as the Commission is well aware, the establishment of the Interim Instream Flow Standards (IIFS) for Nā Wai `Ehā streams is currently pending and will determine how much water must be restored to and remain in these streams for public trust purposes, including the exercise of traditional and customary Hawaiian rights and appurtenant rights. Until the IIFS are established, the amount of water available for offstream uses is not known. Accordingly, it cannot yet be ascertained whether all existing uses can continue to be accommodated. *See, e.g., In re Waiāhole Ditch Combined Contested Case Hearing*, 94 Hawai'i 97, 149, 9 P.3d 409, 461 (2000) (observing that existing uses are not "grandfathered" under the constitution and the Code and stating that "the public trust authorizes the Commission to reassess previous diversions and allocations, even those made with due regard to their effect on trust purposes," and that, in setting the IIFS, "the Commission may reclaim instream values to the inevitable displacement of existing offstream uses" (emphasis added)). Nor can it be determined whether there are "competing applications" within the meaning of HRS §§ 174C-50(h) and -54.

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Therefore, the SWUPAs for existing uses of Nā Wai `Ehā stream water should not be considered until the IIFS are established. Once that occurs, the SWUPAs should be considered concurrently; in other words, the Chumbleys should not have any priority simply by virtue of the fact that they filed their SWUPA earlier than other existing users.

The Chumbleys would, however, have priority over other existing users by virtue of the appurtenant right they claim. However, there is no evidence included in the Chumbleys' SWUPA from which their claim to an appurtenant right can be evaluated. Their SWUPA should be supplemented to include prima facie evidence of the existence of an appurtenant right, so that the Commission can determine the applicability of HRS § 174C-63.

OHA also observes that the "Alternatives Analysis" (Table 4) in the Chumbleys' SWUPA is conclusory, at best. However, if the Chumbleys' land has an appurtenant right, that right would entitle them to stream water and they should not be required to demonstrate the lack of practicable alternative sources. OHA therefore reiterates that the Chumbleys' SWUPA should be supplemented to include prima facie evidence of their appurtenant right.

OHA is the "principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians." (Hawaii Revised Statutes (HRS) § 10-3(3)). It is our duty to "[a]ssess[] the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conduct[] advocacy efforts for native Hawaiians and Hawaiians."¹ (HRS § 10-3(4)). As such, we thank you for the opportunity to comment, and for your diligent efforts to protect these public trust resources. If you have further questions, please contact Grant Arnold by phone at (808) 594-0263 or e-mail him at granta@oha.org.

‘O wau iho nō me ka ‘oia‘i‘o,


Clyde W. Nāmu‘o
Administrator

C: OHA CRC Maui

¹ OHA is a party in the on-going `Iao Ground Water Management Area High Level Source Water Use Permit Applications and Petition to Amend Instream Flow Standards of Waihe'e, Waiehu, `Iao, and Waikapū Streams Contested Case Hearing (Case No. CCH-MA06-01) ("IIFS contested case") and has numerous beneficiaries have property interests in, and/or use surface water from, the the `Iao, Waihe'e, Waiehu, and Waikapū surface water management areas.